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No. 06-1542

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES A. NICHOLS,
Petitioner,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Colorado Court of Appeals

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REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

BNSF avoids Nichols' argument by characterizing it as something it is not. Section I of Respondent's brief, for example, raises a non-issue. Nichols has never argued that a FELA jury cannot separate damages caused by a pre-existing condition in determining its award to a plaintiff. The common law of FELA permits such separation and, if separation can be made, forbids inclusion of any damages caused by a pre-existing condition in damages awarded against the railroad. Likewise, Respondent's discussion of *Ayers*[1] in Section II of its brief treats a non-issue. Nichols has never argued that *Ayers* precludes separation of damages caused by a pre-

[1] *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003).

existing condition from those caused by the railroad's negligence. Petitioner relies on *Ayers* for the analytical framework it provides in addressing a FELA damage issue in light of the Act's "recovery facilitating thrust." *Ayers*, 538 U.S. at 161.

Respondent devotes but one paragraph each to *Gallick*[2] and the three state cases[3] that run contrary to Respondent's argument here. It dismisses these authorities merely by conclusorily declaring them inapposite. Contrary to Respondent's arguments, the fact that the jury was properly instructed that it could not award damages caused by a pre-existing condition is a compelling reason to grant review, not evidence that the courts below merely made a mistake in applying established law. As instructed, the jury had already reduced its damage award for any pre-existing conditions before assessing Nichols' total damages in answer to Question 6.

Nichols' preservation of error in these regards is clearly documented in the record, including at Appendices F at 28a, D, G, J, K & L. At the time BNSF tendered the verdict form used by the trial court, Nichols objected on the basis that FELA and the law interpreting it permitted but one and only one reduction of a FELA damage award—the degree of comparative negligence found by the jury.

ARGUMENT

I. Nichols Has Never Argued That FELA or *Ayers* Forbids Separation of Damages Caused by Pre-existing Conditions.

BNSF persists in characterizing Nichols' argument as advocating that apportionment for pre-existing conditions under FELA is impermissible and equates post-verdict reduction of damages by the trial court with apportionment for pre-existing conditions in determining damages by the jury, *see*,

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[2] *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963).

[3] *Hager*, *Bradley*, and *Worthy*, *supra* at 3-5.

e.g., Opposition Brief at 6, 10-11, to prove a point immaterial to the issue at hand.

Nichols simply argues that the trial instructions properly directed the jury not to award damages attributable to pre-existing conditions and that it must be presumed that the jury followed these instructions in answering Interrogatory 6. *See* Appendix H at 41a-55a (Insts. Nos. 5, 24, 26, 28, 32 & 33).[4] Hence it must be concluded that the jury did not include any damages for any pre-existing conditions in reaching its award.

Under *Gallick*, 372 U.S. 108, reinforced by this Court's decision in *Ayers*, 538 U.S. 135, the unavoidable conclusion is that the *trial court* could not further reduce the jury's award of damages by the pre-existing condition apportionment of Nichols' "condition" after the jury had already excluded from its damage award in answer to Question 6 any amount attributable to a pre-existing condition. The question of pre-existing conditions goes only to the calculation of damages by the *jury* and may not be used by the trial court as a basis for a further reduction of the jury's damage award.

The verdict form supports this interpretation. The only damage calculation made by the jury was the $800,000. This amount represented "the full amount of all damages sustained by the plaintiff, as a proximate result of the accident," Appendix H at 50a (Inst. No. 24), and thus "the amount that would fully compensate Plaintiff for his injury." Appendix A at 5a (Question 6). The answers to Questions 7 and 8 provide no basis for determining damages because the instructions directed that the jury could only award damages caused by the railroad's negligence. Question 6 specifically instructs the

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[4] Instruction No. 24 directed the jury that, before comparing the negligence of the parties, it must "*first*, determine the full amount of all damages sustained by the plaintiff, as a proximate result of the accident . . . ." Appendix H at 50a. There is no reference to inclusion of damages sustained as a result of pre-existing conditions.

jury to answer the question "without any reduction for any negligence which you may find on the Plaintiff's part . . . ." It does not, however, direct the jury to answer Question 6 without any reduction for *pre-existing conditions*. The plain terms of Question 6, when read along with the jury instructions, request a dollar amount that would fairly compensate the Plaintiff for his injury proximately caused by defendant's negligence, without any reduction for comparative negligence, but *with* a reduction for damages attributable to a pre-existing condition as the instructions directed.

Moreover, while the instructions informed the jury that any finding of comparative negligence would reduce damages awarded, Appendix H at 49a-50a, Inst. 23, the jury was never informed, in either the instructions or in the verdict form questions, that the answers to Questions 7 and 8 could result in a further reduction.[5] Absent any reference to "injury," "damages," or to "Question 6" in either Questions 7 or 8, it must be presumed that the jury did not consider the answers to those questions as possibly having that effect.

II. BNSF's Discussion of Nichols' Medical History is Irrelevant and Attempts to Argue an Impermissible Point.

BNSF presented *no* medical evidence in this case that, absent the injuries caused by the work accident, Nichols would have inevitably suffered the same permanent and total disability from working as a railroad engineer. Nichols had experienced *no* symptoms relating to his back or right knee prior to the accident, for which he was compensated by the jury. Tr.3 at 65:5-19. Not until treatment for the injuries he sustained in the fall was it discovered that Nichols had a congenital knee problem, Tr.3 at 65:20-24; Tr.3 at 16:22-

[5] Compare Questions 9 and 10 on the issue of mitigation. Appendix A at 6a. These questions refer explicitly to the "damages" found in response to Question 6.

17:2, and a mild degenerative condition in his spine. Tr.3 at 18:7-12. The damages awarded at trial were caused by BNSF's negligence in returning Nichols to work, without restrictions, knowing of his hand and wrist weaknesses that made him more vulnerable to on-the-job injury.

BNSF's one-sided recitation of Nichols' medical history implies that a second 70% reduction in the jury's damage award was warranted and is merely an attempt to argue indirectly that the underlying evidence does not support the $800,000 jury award—an argument neither supported by the evidence nor preserved by BNSF. BNSF did not appeal the award on the basis that it was against the great weight of the evidence and should not now be permitted to recast Nichols' medical history to back-door this argument.

III. Nichols Indisputably Preserved His Objection to the Verdict Form For Appeal.

The court of appeals held that Nichols preserved his right to appeal the propriety of the verdict form and the court's second reduction of damages. Appendix B at 11a-12a. The court's conclusion that Nichols failed to preserve his right to object to "the order" of the questions, *id.* at 12a, ignored authorities holding that a party is not required to object to inconsistencies in a *special verdict* before the jury is discharged in order to preserve the right to challenge the inconsistencies in a subsequent motion or on appeal. *See, e.g., Thompson v. State Farm Fire & Cas. Co.*, 34 F 3d 932, 944 (10th Cir. 1994); *Bonin v. Tour W., Inc.*, 896 F.2d 1260, 1263 (10th Cir.1990); *Morales v. Golston*, 141 P.3d 901, 905 (Colo. App. 2005), *citing Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847 (10th Cir. 2000).

BNSF's bald statement that Nichols merely objected to its form on the basis that FELA does not allow for apportionment of pre-existing conditions is incorrect. Opposition Brief at 10-11. Rather, Nichols objected to the inclusion in the form

of any special interrogatories concerning pre-existing conditions and to the wording of the form on the ground that, while the jury may account for pre-existing conditions in reaching the general damages verdict in a FELA case, asking for a percentage allocation of such conditions in a special interrogatory and the court's reduction of a general verdict based on the jury's response would be error. Appendix F at 28a. Further, Nichols tendered his own, correctly worded proposed verdict form, which the trial court rejected. *See* Appendix F at 28a. This is more than sufficient to preserve all of the objections now voiced by Nichols. Further, the federal character of these issues was raised in the trial court, the Court of Appeals, and the Colorado Supreme Court. *See* Appendix D, F, G, J, K, & L.

IV. BNSF Fails to Respond With Any Analysis of *Gallick* Nor Any Meaningful Distinctions of the State Court Cases, But Merely Declares Them Inapplicable.

BNSF fails to address Nichols' extensive discussion of *Gallick* and the state cases, *Bradley*, *Hager*, and *Worthy*, which reject Respondent's argument here. Petition at 12-18. BNSF devotes only one paragraph to *Gallick*, Opposition Brief at 17, and less than one page to the state court cases. *Id.* at 9. Without analysis, BNSF simply declares all four cases to be distinguishable. Contrary to BNSF's insubstantial attempt to distance them from the facts of this case, these authorities squarely address the same issues raised on appeal and conclude that the use of such pre-existing condition interrogatories is improper, and further, even if utilized in the trial of a FELA case, the subsequent reduction of an award based upon the jury's answers to those questions would be error.

In *Hager v. Norfolk & Western R. Co.*, 2006 WL 3634373 (Ohio 2006), the Ohio Supreme Court properly reconciled the jury's award of damages with its answers to pre-existing condition questions in a FELA case to uphold the damage

award rather than reduce it. The court concluded that "reading the interrogatories in conjunction with the trial court's instructions, it appears the jury deducted the 60 percent from the verdict. It is presumed the jury followed the trial court's instructions." *Id.* at *8. This is precisely the position that Nichols urges here. *See also Gallick*, 372 U.S. 108.

Also directly on point is *Norfolk So. Ry. Co., Inc. v. Bradley*, 772 So.2d 1147 (Ala. 2000), involving a railroad engineer who suffered injuries when the train he was operating struck another train after he was instructed to switch tracks. The engineer sued, alleging that the railroad was negligent by failing to determine whether the engineer's track was clear. The trial court entered judgment on the jury's $700,000 verdict and denied the railroad's motion for a new trial, judgment n.o.v., or remittitur.

The railroad urged on appeal that the trial court's refusal to submit a special verdict form to the jury asking for apportionment of damages between the accident and pre-existing and unrelated illnesses was error. In denying the motion for a new trial, the trial court observed that the proposed verdict form, including questions nearly identical to those at issue here,[6] was "unduly confusing and would have been susceptible to misinterpretation." *Id.* at 1152.

The Alabama Supreme Court upheld the trial court's rejection of the proposed verdict form, reasoning as follows:

> The questions are inconsistent and present an incorrect basis for determining damages. The questions would have asked the jury to determine the amount of damages Bradley was entitled to based on the on-the-job accident

[6] Question 6 in *Bradley* asked: "What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury he received?" *Id.* Question 7 asked: "What percentage of the damages determined in Question No. 6 above is attributable to a pre-existing condition or to the Plaintiff's previous or subsequent accidents?" *Id.*

> and then to assign a percentage of those damages as being attributable to another accident or medical condition.

Id. The court also observed that "the trial court specifically charged the jury that Bradley could not recover for any other accident or illness that was not directly the result of the accident in question." *Id.*

Here, the jury was also properly instructed, but was erroneously asked the near-identical (but even more confusing) questions regarding pre-existing conditions rejected by the *Bradley* court.[7] Just as in *Bradley,* the verdict form here was also confusing, misleading, inconsistent, and presented an incorrect basis for determining damages. Like in *Bradley,* as instructed, the jury would already have taken into account the effect of any pre-existing conditions when it calculated damages at $800,000. Thus, the answers to Questions 7 and 8 should have been disregarded as surplusage.

Worthy v. Norfolk So. Ry. Co., 619 N.E.2d 1371, 1375-76 (Ill. App. 1993), also provides helpful guidance. *Worthy* approved the trial court's rejection of interrogatories calling for a percentage apportionment of damages to pre-existing conditions because, in reality, the questions related not to the issue of aggravation, but to the reduction of damages. Because reduction of damages was not an issue of ultimate fact upon which the rights of the parties depended in the case, the appellate court concluded that such interrogatories were improper for submission to the jury in the trial of a FELA action.

Such is precisely the case here. It must be presumed that the jury followed the instructions given and thus did not include any amount for a pre-existing condition in its award of

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[7] BNSF dismisses *Bradley* on the basis that it "affirmed the trial court's rejection of the defendant's tendered instruction because *it* was confusing and misleading." Opposition Brief at 9. Nichols submits that such confusion would ensue in almost every FELA case where these types of interrogatories are submitted to the jury.

$800,000, a result fully supported by the evidence of record. Thus the answers to Questions 7 and 8 go not to aggravation but to reduction of damages. Moreover, if the answers to Questions 7 and 8 could be viewed as inconsistent with the answer to Question 6, that inconsistency must be resolved to uphold the jury's only finding of damages in this case, and entry of judgment in the amount of $560,000 should be ordered. *See Gallick*, 372 U.S. 108; *Hager*, 2006 WL 3634373.

V. Neither *Sauer*, *Meyer*, nor *Rust* Support a Second Reduction of the Damage Award.

BNSF relies upon *Sauer v. Burlington N. Ry. Co.*, 106 F.3d 1490 (10th Cir. 1996), for the proposition that the Tenth Circuit Court of Appeals approved a second reduction of damages based on answers to pre-existing condition questions in a special verdict form. *Sauer*, however, reached no such result. The propriety of the verdict form was not at issue on appeal. *Sauer* addressed only whether the evidence supported an *instruction* on apportionment of damages. *Sauer* does not hold that the trial court was compelled to submit questions inquiring into the percentage of injuries attributable to pre-existing conditions and to then reduce the jury's damage award by that amount.

Cases upon which BNSF relies decided subsequent to *Sauer*, Opposition Brief at 7-9, are equally inapposite. *Meyer v. Union Pacific Rd. Co.*, 865 A.2d 857 (Pa. Super. Ct. 2004), dealt with jury *instructions* addressing apportionment, not special interrogatories. Nichols has never argued that the instructions given to the jury in this case regarding pre-existing conditions were inappropriate; rather, Nichols argues that the questions on the *verdict form* were improper, misleading, and erroneous and that FELA does not allow such post-verdict *reductions* under *Gallick* and *Ayers*.

Rust v. BNSF Ry. Co., 308 F. Supp.2d 1230 (D. Colo. 2003), presented a sufficiency of the evidence question in ruling on a motion in limine seeking to exclude pre-existing condition

evidence. Indeed, *Rust* explains that the railroad is entitled to present evidence of pre-existing conditions to enable the jury to correctly apportion damages in its "computation." *Id.* at 1231. In doing so, *Rust* recognizes that it is the role of the jury, not the judge, to determine the question of damages, and in the process must consider whether any pre-existing conditions were aggravated by the railroad's negligence.

CONCLUSION

The importance of the issue involved in this case to the uniform and efficient administration of FELA cases throughout the nation and the preservation of the right of all FELA claimants to trial by jury on all factual issues cannot be underestimated. Further, the issue is "beyond the academic or episodic." *Rice v. Sioux City Cemetary*, 349 U.S. 70, 74 (1955). If allowed to stand, the published opinion will have widespread and costly practical impact on the resources of state and federal courts and FELA litigants.

For the reasons stated above, and in his Petition for Writ of Certiorari, Nichols respectfully requests the Court to accept certiorari review to announce its own decision regarding the propriety of a trial court's double reduction of a FELA damage award based upon the answers to improper, confusing, and inconsistent questions contained in a special verdict form.

Respectfully submitted,

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